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October 25, 1990

MEMORANDUM FOR: LENORE CHINN  
Human Rights Commissioner

FROM: PETER JAMERO  
Executive Director,  
Human Rights Commission

SUBJECT: Proposed Ordinance - "Recognition of Domestic  
Partners" (Proposition K)

This is in response to your July 26, 1990, letter requesting information "on the potential impact of the Domestic Partners legislation to those who must rely on government benefits due to health disabilities." Jerry Davis and Cynthia Goldstein of the HRC staff have prepared the attached memorandum which addresses the question you have raised, as well as presenting a full examination of the issues surrounding domestic partnerships. I hope that this will provide you with the information you need. If you have any questions please feel free to contact either Jerry or Cynthia directly.





## DOMESTIC PARTNERSHIPS

### OBLIGATIONS WITHOUT BENEFITS? RECOGNITION WITHOUT EQUALITY?

#### I. INTRODUCTION

Sandra Rovira and Marjorie Forlini were lovers and family partners. They had exchanged rings and vows in a wedding ceremony. They had lived together for 12 years, mingling their finances, buying a house together and raising children. Ms. Forlini then became ill and died. However, in the eyes of AT&T, Ms. Forlini's employer, Ms. Rovira was not part of Ms. Forlini's surviving family.

In August 1990, Ms. Rovira sued AT&T because AT&T refused to pay survivor death benefits to her which it would have paid had Ms. Rovira been a surviving spouse. AT&T claimed that it was ridiculous for Ms. Rovira to consider herself as Ms. Forlini's surviving spouse. AT&T's denial occurred despite the fact that AT&T's personnel policies promise not to discriminate on the basis of sexual orientation.

Ms. Rovira's situation is not unusual, as same-sex couples routinely are denied employment and other benefits which are provided to married heterosexual couples. This denial of benefits is indicative of the broader problem that lesbian and gay male families face in American society, as they are treated either with disdain or as nonexistent. Ms. Rovira's lawsuit, like others in recent years, forces the heterosexual majority society to confront issues of recognition, equity and fairness. As Ms. Rovira said: "We were a family like any other family, and we deserved to be treated like one."

In addition to litigation, various means of rectifying the invidious discrimination against the families of gay men and lesbians have been proposed and implemented. In particular, the recognition and registration of "domestic partnerships," i.e., persons in committed relationships who are not or cannot be married, and the extension of employment and other societal





benefits based on the status of being a couple, have been initiated by some local jurisdictions and private employers.<sup>1</sup>

In the City of San Francisco the voters in the November 1990 election are being asked to approve an ordinance,<sup>2</sup> Proposition K, which primarily would provide recognition of the relationships of lesbians and gay men through a registration system. This paper will focus on issues arising from the creation and registration of domestic partnerships, with the provisions of Proposition K used as an example of a domestic partnership ordinance.

We strongly recommend that prospective domestic partners, no matter where they live, carefully consider all the potential consequences of signing an affidavit or declaration of domestic partnership and of filing or registering such affidavit or declaration with a city official. Moreover, all unmarried couples, even those who do sign a Declaration of Domestic Partnership, should draft documents and legally structure their property so that they may protect, to the extent possible by law, the families they have created.

## II. PROVISIONS OF PROPOSITION K

Proposition K states that its purpose "is to create a way to recognize intimate committed relationships, including those of lesbians and gay men who otherwise are denied the right to identify the partners with whom they share their lives." (Section 1).

The proposed ordinance defines "domestic partners" as:

[T]wo adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, who live together, and who have agreed to be jointly responsible for basic living expenses incurred during the Domestic Partnership." (Section 2(a)).

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<sup>1</sup> It is interesting to note that while domestic partnerships are primarily considered as benefitting same-sex couples, the majority of those who have taken advantage of domestic partnership laws are unmarried heterosexual couples. (The New Times, September 21, 1990).

<sup>2</sup> See Attachment 1.





Two persons who meet the above criteria and who desire to form a domestic partnership create the partnership by signing a "Declaration of Domestic Partnership." (Section 3). This declaration is either filed with the County Clerk in San Francisco's City Hall or is notarized. (Section 3(a)).

When two persons sign a Declaration of Domestic Partnership, they are doing more than declaring their strong commitment to each other and obtaining societal recognition of that commitment. The two partners are also signing a contract for mutual support in which they agree "to be jointly responsible for basic living expenses which they incur during the domestic partnership" and that the agreement can be "enforced by anyone to whom those expenses are owed." (Section 2(d)(emphasis added)).

While the economic integration attested to in the Declaration of Domestic Partnership is a good indicator of "couplehood," i.e., the seriousness of the commitment between the partners, prospective domestic partners should be aware of the obligations they are assuming, who can enforce these obligations against the partners and what effect the signing of the declaration may have on benefits to which either or both of the domestic partners may be entitled.

Proposition K does not provide any specific rights, provide any nonsymbolic benefits, nor provide any protection to couples who sign a Declaration of Domestic Partnership. However, a Declaration of Domestic Partnership could be acknowledged by public or private employers or service providers and thus be used to secure benefits previously only given to married couples. These benefits include, inter alia, survivor retirement benefits, bereavement leave, family care leave and health insurance benefits.

There is no requirement in Proposition K for employers or service providers to recognize a domestic partnership. Any recognition of domestic partnerships by employers and service providers would be purely voluntary and displaying a declaration of domestic partnership to an employer or service provider would not ensure or mandate treatment equal to that provided married persons.

### III. WHY NOT MARRIAGE?

Marriage is spoken of by some in terms of reverence, sanctity, and holiness. Others view it as a flawed institution which has been used to repress women. However, it is important to remember that marriage is also a civil contract authorized by state law

The present volume is a collection of papers presented at the 1985 meeting of the American Psychological Association, held in San Francisco, California. The papers are arranged in four sections: (1) General Issues, (2) Developmental Psychology, (3) Clinical Psychology, and (4) Special Topics. The first section, General Issues, contains papers on the nature of intelligence, the development of language, and the role of emotion in decision making. The second section, Developmental Psychology, contains papers on the development of memory, the development of social skills, and the development of moral reasoning. The third section, Clinical Psychology, contains papers on the treatment of anxiety disorders, the treatment of depression, and the treatment of substance abuse. The fourth section, Special Topics, contains papers on the psychology of aging, the psychology of the handicapped, and the psychology of the environment.

The papers in this volume are of high quality and provide a comprehensive overview of current research in psychology. The editors have done a excellent job of selecting papers that are both interesting and informative. The volume is a valuable addition to the library of any psychologist or anyone interested in the field of psychology. The papers are well written and easy to read, and the volume is well organized and easy to navigate. The volume is a must-read for anyone interested in the field of psychology.

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### THE PSYCHOLOGY OF AGING

The paper by Smith and Jones (1985) is a review of the literature on the psychology of aging. The authors discuss the physical, cognitive, and emotional changes that occur with aging, and the role of these changes in the development of aging-related problems. The authors also discuss the role of social and environmental factors in the development of aging-related problems. The paper is a comprehensive overview of the current research in the field of the psychology of aging.



which can be entered into only by a male and a female.<sup>3</sup> Out of this contract there arises a personal relation between the parties. The marriage contract creates reciprocal rights and obligations including cohabitation, coition, mutual respect, fidelity and support.

Unlike heterosexual couples who can choose to be married or not, same-sex couples are not currently permitted to marry in any state in the United States.<sup>4</sup> This inability to marry helps to sustain the lie that lesbians and gay men do not have stable long term marital-like relationships. In reality, same-sex marriage is wholly consistent with the theoretical and policy justifications behind the right to marry, which include familial and societal stability, privacy and autonomy, and self-determination.<sup>5</sup>

Marriage laws also discriminate against gay men and lesbians because the status of marriage is used to provide benefits and recognition to heterosexual couples, while denying these to same-sex couples. The inequities between same-sex couples and their married counterparts include:

1. Same-sex couples cannot file joint federal and state income tax returns, nor claim "spousal" deductions. Married couples are permitted to file joint returns and claim spousal deductions.
2. Same-sex couples cannot claim estate and gift tax benefits which are provided to married couples and do not automatically inherit a partner's property in the event that he/she dies without a will.

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<sup>3</sup> California Civil Code, Section 4100. The marriage is licensed, solemnized and a certificate of registry of marriage is filed.

<sup>4</sup> In 1989 the California State Bar Conference of Delegates approved a resolution calling for the amendment of the civil code to permit same-sex marriage. No legislative action has been taken on this resolution. Also in 1989, the Danish Parliament passed a bill which provides for the registration of same-sex partnerships. The bill provides that couples who enter into "registered partnerships" are entitled to all the benefits and incur all the obligations of marriage.

<sup>5</sup> "Sexual Orientation and the Law," Harvard Law Review, (Cambridge, Massachusetts: 1990), pp. 96-98.



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3. Same-sex couples cannot recover damages based on an injury to their partners, or receive workers' compensation insurance for on-the-job injuries or the death of a partner.<sup>6</sup> Married couples can obtain such recovery.
4. Same-sex couples cannot automatically enter hospitals, jails and other places which are restricted to "immediate family." Married couples automatically have such a right.
5. A member of a same-sex couple, such as Sandra Rovira, is generally unable to obtain health insurance, dental insurance, bereavement leave, family care leave, retirement benefits and other employment benefits which employers routinely grant to spouses.
6. A married person can obtain unemployment and tax benefits if she/he quits her/his job to move with her/his spouse to a new location because the spouse has obtained a new job. Same-sex partners cannot receive such benefits.
7. Same-sex couples, such as Karen Thompson and Sharon Kowalski, are not automatically permitted to make medical decisions or obtain guardianship in the event that their partner is injured or incapacitated. Married persons can.
8. Same-sex couples have no rights under California's Family Law Act.<sup>7</sup>
9. Community property rights to property acquired during marriage are not granted to same-sex couples.
10. A surviving spouse - even a divorced widow or widower - is entitled to Social Security benefits if the marriage lasted at least 10 years and neither partner remarried before

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<sup>6</sup> Cf. Donovan v. County of Los Angeles and State Compensation Insurance Fund, 73 LA 385-107 (California Workers' Compensation Appeals Board, Opinions and Notice of Intention, November 3, 1983).

<sup>7</sup> California Civil Code, Section 5100 et seq.





the age of 60. A surviving same-sex partner is denied this benefit.

11. Same-sex couples face discrimination in housing as many jurisdictions have enacted exclusionary zoning ordinances that restrict the sale and rental of housing to single families. Unmarried couples are generally not held to be "family."
12. Communications between spouses are often privileged and are not subject to disclosure. No such privilege exists for same-sex couples.
13. Domestic violence laws generally offer no protection where there is a same-sex relationship.

Domestic partnership laws passed by local jurisdictions cannot affect state marriage laws.<sup>8</sup> Thus, even if Proposition K passes in San Francisco, same-sex marriage will still be illegal in San Francisco, as well as the rest of California, and the benefits of marriage will still be unavailable to same-sex couples. This inequality will be heightened by the fact that by signing a Declaration of Domestic Partnership, same-sex couples will not only be assuming many of the same obligations as married people, but also will be required to meet qualifications NOT imposed on people who wish to marry.<sup>9</sup>

#### IV. Alternatives/Supplements to Domestic Partnership Agreements

Lesbian and gay male couples have employed a number of legal mechanisms to circumvent the barriers posed and the harm caused by the nonrecognition of their relationships. These mechanisms include property ownership in joint tenancy with the automatic right of survivorship; beneficiary designations; powers of

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<sup>8</sup> As marriage is created by state law, no local ordinance could change the law. Any changes to the state marriage law must be done by the state legislature. See, Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877). Amending the state laws to permit same-sex marriage is increasingly the object of discussion. See, "Here Comes the Groom - A (Conservative) Case for Gay Marriage," The New Republic, August 28, 1989; "Sexual Orientation and the Law," Harvard University Law Review, supra, pp.93-119.

<sup>9</sup> These additional qualifications include that the partners live together at the time they sign the Declaration of Domestic Partnership (Section 2(a)) and that a person cannot become a member of a domestic partnership until at least six months after any other domestic partnership of which he or she was a member ended (Section 3(b)).





attorney, including "durable" powers of attorney for health care; reciprocal wills; trusts; adoption and guardianship designations and various contracts. It is imperative that same-sex couples structure their lives to protect themselves. Lesbian and gay male couples should utilize available resource material,<sup>10</sup> or explore with legal counsel, the drafting and signing of those documents which will achieve their goals.

In Marvin v. Marvin<sup>11</sup> the California Supreme Court held that non-marital partners were not precluded from making enforceable agreements between themselves as long as the contract was not based on the performance of sexual acts. In Whorton v. Dillingham<sup>12</sup> a California appellate court upheld an oral agreement made by a gay male couple.

Because of Marvin and Whorton, lesbian and gay male couples should consider entering into written "living together" agreements. These agreements are legal contracts between the partners and are usually broader in scope than a Declaration of Domestic Partnership. The agreements can cover some of the same issues as a pre-nuptial or separation agreement entered into by heterosexual couples.

The typical living together agreement covers:

1. How the couple's incomes will be apportioned to benefit the parties;
2. Rights to property acquired during the relationship and how property should be divided in the event of separation.
3. Support payments by one party to another for a specified period of time in the event of separation.
4. Provisions of child custody, support and visitation.
5. How liabilities and debts, such as for household expenses, should be shared.
6. Consent for making medical decisions in cases of sickness or injury.

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<sup>10</sup> See, Curry and Clifford, A Legal Guide for Lesbian and Gay Couples (Nolo Press, 1989).

<sup>11</sup> 18 Cal. 3d 660, 557 P.2d 106, 134 Cal Rptr 815 (1976)

<sup>12</sup> 248 Cal.Rptr. 405 (Court of Appeals, 1988)



The key to a legally enforceable living together agreement is that it is not based on sexual services but on considerations such as companionship, maintaining the home and contributing to living expenses. Legal counsel or legal guides and reference materials should be consulted in drafting one of these agreements.

#### V. HISTORY OF DOMESTIC PARTNER LEGISLATION IN SAN FRANCISCO

In late 1982, the Board of Supervisors of San Francisco passed an ordinance sponsored by Supervisor Harry Britt which provided for registration of domestic partnerships. The Board also passed two resolutions. One resolution urged the Health Service Board to develop plans to extend health insurance coverage to the domestic partners of City employees. The other resolution urged the Civil Service Commission to promulgate regulations providing for sick and bereavement leave for City employees who had domestic partners.

Mayor Feinstein vetoed the ordinance and the Board of Supervisors did not override the veto. In 1983 Mayor Feinstein did appoint a Task Force to study the health benefits issue and make recommendations. In July 1984 the Task Force made a unanimous recommendation to the Mayor that benefits be extended to gay male and lesbian domestic partners. Mayor Feinstein rejected these recommendations.

In the spring of 1988 two ordinances to extend specific employee benefits to people other than the traditionally defined spouse and minor children were introduced before the Board by Supervisors Britt and Nelder. The Britt proposal would have permitted registration of domestic partners, granted City employees bereavement leave upon the death of an employee's domestic partner,<sup>13</sup> provided hospital visitation rights to domestic partners and provided leave to care for the child of a domestic partner. The ordinance would have also recommended that the Mayor establish a task force to examine the creation of health care benefits and retirement benefits for the domestic partners of City employees and their dependent children and consider the creation of a pilot program for domestic partners health insurance.

The Nelder proposal called for a wide range of people to be covered by employee benefits. One of its purposes was to recognize the diversity of non-traditional households in which people establish living arrangements. The proposal urged the Health Service Board to extend dependent status to include exten-

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<sup>13</sup> This proposal would have also extended to the employees of City contractors.





ded family members, provide for a Charter amendment to entitle an employee to name a beneficiary for survivor benefits in the event that no surviving spouse or minor children existed and called for the Mayor to establish a task force to examine information concerning extended family benefits in other communities, as well as actuarial information pertinent to extended family health insurance coverage.

Both proposals were not pursued further than committee. On March 8, 1989, the Human Rights Commission held a public hearing on domestic partners, marital status and extended family policy. The Human Rights Commission issued broad findings and recommendations on April 21, 1989.

On April 25, 1989, Supervisor Britt announced the details of a four part plan to end discrimination based on marital status. This plan included legislation establishing as the policy of the City and County of San Francisco the right to form primary relationships and the banning of discrimination against people whose relationships are not socially sanctioned.

Supervisor Britt also announced an initiative to coordinate with the San Francisco Chamber of Commerce the voluntary review by private businesses of various corporate policies of concern to employees in domestic partner relationships, such as bereavement leave. The Chamber was to facilitate communication and the sharing of information in the business community.

Supervisor Britt's proposed legislation was unanimously passed by the Board of Supervisors on May 22, 1989, and was signed by Mayor Art Agnos. However, the ordinance was challenged in the November 1989 election as Proposition S. Proposition S was narrowly rejected by the voters, 50.5% to 49.5%.

Proposition S and the current Proposition K defined domestic partnerships in the same way and both provided for a registration system. However, Proposition S was more extensive than Proposition K because it also:

1. prohibited discrimination against domestic partners, including, but not limited to, treating domestic partners the same as married couples in any decision policy or practice which used marital status as a factor;
2. required that the Human Rights Commission of the City and County of San Francisco provide informational materials which would describe ways individuals in committed relationships could give their relationships stronger legal effect;





3. would have allowed patients in health care facilities to name the individuals who would be allowed to visit and allow a domestic partner to visit even if not designated;
4. prohibited retaliation against any person who sought the benefit of the ordinance; and
5. provided for enforcement by the Human Rights Commission as well as a private cause of action in court.

Concurrent with the passage of the domestic partners legislation by the Board, the Board adopted a resolution which recommended that Mayor Agnos establish a Task Force on Family Policy. The Board recommended that the Task Force develop a plan for adoption by the Health Service Board under which same-sex and other unmarried couples could be accorded the benefits of the City's health benefits plan and that the Task Force systematically examine all policies and practices of the City, identify those which disadvantage same-sex couples and other unmarried couples, and propose changes to end that discrimination. Mayor Agnos approved this resolution on May 25, 1989.

In June 1989 Mayor Agnos selected a 20 person Family Policy Task Force. The Task Force was charged by the Mayor to examine two issues critical to the well-being of families in San Francisco: 1) whether employment benefits provided to City workers could be expanded to include health insurance coverage for the domestic partners and extended family members of those workers; and 2) whether the operation of City government should be altered in an effort to be more supportive of the diverse family structures found in San Francisco today.

On June 13, 1990, the Task Force issued its report - Approaching 2000: Meeting the Challenges to San Francisco's Families. The Task Force made twenty-five recommendations concerning the City as an employer, the City as a provider of services, and the City as contractor. Included among these recommendations were proposals regarding domestic partnerships, each of which was endorsed by Mayor Agnos.

First, the Task Force called for the creation of a family registry to register extended and alternative families, as well as a separate registry for committed couples. Second, the Task Force recommended that the Health Commission issue a written policy regarding hospital visitation. On June 19, 1990, the Health Commission memorialized and supported a policy for San Francisco's public and private hospitals which permits visits from persons with significant but not legally recognized relationships to patients, such as domestic partners, and to the



children and other relatives of such persons, on the same basis that they allow visits from other family members and to encourage all hospitals to embody this policy in writing.

Third, the Family Policy Task Force made recommendations affecting City workers who have domestic partners. These recommendations were broader than previous legislation, as they recommended not only modification to the City's bereavement leave policy, and providing health insurance coverage for domestic partners of City employees, but also establishing an unpaid family care leave so that employees would be able to address serious family issues such as the health condition of a domestic partner. These leave recommendations were forwarded by Mayor Agnos to the Civil Service Commission for approval.

On October 15, 1990, the San Francisco Civil Service Commission approved rule changes modifying bereavement leave to include leave for the death of a domestic partner and including domestic partners in a new family care leave policy. The Commission also adopted the Task Force's broadly inclusive definition of "family"<sup>14</sup> as governing the employment policies of the City and established religious leave for City employees.

Mayor Agnos also forwarded the Task Force's report to the Health Service Board and recommended that it take action on the Task Force's health insurance recommendations. The proposals to provide domestic partner health insurance and extend health insurance to adult children of employees are currently pending adoption by the Health Service Board.

## VI. CURRENT AND PROPOSED DOMESTIC PARTNERSHIP LAWS/POLICIES<sup>15</sup>

A. No state has passed a statute concerning domestic partnerships, though several states are considering such laws.

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<sup>14</sup> The Task Force defined a "family" as a:

"unit of interdependent and interacting persons, related together over time by strong social and economic bonds and/or by ties of marriage, birth and adoption, whose central purpose is to create, maintain, and promote the social, mental, physical and emotional development and well being of each of its members."

This definition was originally developed by the Department of Family Health Care Nursing of the University of California at San Francisco.

<sup>15</sup> This section will cover existing and proposed laws and policies in jurisdictions other than San Francisco.



Several local jurisdictions have passed statutes and/or ordinances concerning domestic partnerships or have made changes in policy to recognize domestic partnerships in some instances.<sup>16</sup> The jurisdictions have different requirements for a couple to be considered a domestic partnership. However some provisions are common to all laws and/or policies. These include that:

1. the partners reside together (usually for some minimum period of time);
2. the partners are not married;
3. each of the partners is eighteen years of age or older;
4. the partners are not related by blood closer than would bar marriage;
5. the partners are mentally competent to consent to contract at the time when the domestic partnership begins.

#### B. Survey of Domestic Partnership Policies/Ordinances

##### 1. City of Berkeley, California

Policy applies to:  
City employees

Economic indicia of couplehood:  
"[T]hey are responsible for their common welfare."

Benefits provided to domestic partnerships:  
1. Health and dental insurance;  
2. Bereavement leave.

Number of Domestic Partnerships filed:  
115 (17 are same-sex couples)<sup>17</sup>

NOTE: Berkeley also cautions domestic partners that "this declaration may have potential legal implications under California law which has recognized that non-

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<sup>16</sup> In addition, several private employers such as The American Friends Service Committee, the National Organization for Women, the American Psychological Association, the American Civil Liberties Union, and the Village Voice have extended benefits to the domestic partners of their employees.

<sup>17</sup> National Gay and Lesbian Task Force.





marital cohabiting couples may privately contract with respect to the financial obligations of their relationship."

## 2. Berkeley Unified School District

Policy applies to:

School district employees

Economic indicia of couplehood:

The two partners "share the common necessities of life" and are "responsible for their common welfare."

Benefits provided to domestic partnerships:

1. Health insurance and dental benefits;
2. Bereavement leave;
3. Other district controlled benefits previously available to employees solely on the basis of marriage.

## 3. Illinois (proposed state statute)

Law will apply to:

Anyone

Economic indicia of couplehood:

"The partners agree to "share the common necessities of life and agree to be responsible for basic household living expenses." The prospective partners also agree to "be responsible for each other's welfare."

Benefits provided to domestic partnerships:

Visitation rights in health care facilities

## 4. Ithaca, New York

Law applies to:

Anyone

Economic indicia of couplehood:

"The persons declare that they are in a relationship of mutual support, caring and commitment and are responsible for each other's welfare. For these purposes, mutual support means that they contribute mutually to each other's maintenance and support."



Benefits provided to domestic partnerships:

Ordinance states that its purpose is to facilitate the definition of those who may be entitled to benefits in the future. The ordinance itself provides no benefits.

5. Laguna Beach, California

Policy applies to:

City employees

Economic indicia of couplehood:

"We . . . are responsible for our common welfare."

Benefits provided to domestic partnerships:

Health insurance including dental coverage

6. Los Angeles, California

Law applies to:

City employees

Economic indicia of couplehood:

The partners "share the common necessities of life."

Benefits provided to domestic partnerships:

Extended family sick leave and bereavement leave allowances include domestic partners within the definition of "immediate family." This is now in negotiation with employee union to be included in contracts.

7. Madison, Wisconsin

Law applies to:

Anyone (registration)

Economic indicia of couplehood:

The couple is "not in a relationship that is merely temporary, social, political, commercial or economic in nature."

Benefits provided:

1. Sick and bereavement leave to city employees;
2. Domestic partners included in definition of family in zoning ordinance;
3. Discrimination against unmarried couples in public accommodations is prohibited.





Number of domestic partnerships filed: 2 <sup>18</sup>

8. Minneapolis, Minn. (proposed ordinance)

Law will apply to:

Anyone

Economic indicia of couplehood:

The partners agree "to be jointly responsible for basic living expenses incurred during the domestic partnership."

Benefits provided:

1. Nondiscrimination;
2. Visitation in health care facilities.

9. New York, New York

Unpaid bereavement leave was granted to city employees with domestic partners by an executive order issued by Mayor Koch. The definition of domestic partner includes that the two people have "shared responsibilities."

10. New York, New York (proposed statute)

Law will apply to:

Anyone

Economic indicia of couplehood:

The partners agree "to be jointly responsible for basic living expenses." In addition, in the event of death the existence of the domestic partnership can be established by proving financial commitment and interdependence.

Benefits provided to domestic partnerships:

Nondiscrimination - when a marital relationship is used as a factor in any decision, policy or practice, or as the basis for any right, benefit or protection, domestic partnerships must be accorded the same treatment.

11. New York (proposed state statute)

Law will apply to:

Anyone

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<sup>18</sup> National Gay and Lesbian Task Force



Economic indicia of couplehood:

"The persons have agreed between themselves to be responsible for each other's welfare."

Benefits provided:

1. Amends state insurance laws to allow for domestic partner health insurance; moreover, if a policy provides benefits to spouses it must also provide benefits to domestic partners.
2. Discrimination in employment and housing is banned against someone because of his/her status as a domestic partner.
3. Visitation rights in hospitals, nursing homes and residential health care facilities.

## 12. Santa Cruz, California

Policy applies to:

City workers (by agreement with SEIU)

Economic indicia of couplehood:

"The two parties . . . share the common necessities of life" and "they are responsible for our common welfare."

Benefits provided to domestic partnerships:

1. Medical, dental and vision insurance;
2. Sick and bereavement leave

Number of domestic partnerships filed: 33 <sup>19</sup>

## 13. Seattle, Washington

Law applies to:

City employees

Required economic indicia of couplehood:

"He or she and his or her domestic partner . . . share the same regular and permanent residence, have a close personal relationship and have agreed to be jointly responsible for basic living expenses incurred during the domestic partnership."

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<sup>19</sup> National Gay and Lesbian Task Force. This number is estimated - exact figures are not known. However, a majority are heterosexual.



Also the partners agree that they "are responsible for each other's common welfare."

Benefits provided:

1. Funeral leave;
2. Use of sick leave to take care of a domestic partner;
3. Medical and dental insurance coverage extended to domestic partners (effective May 1, 1990).

Number of domestic partnerships filed:

200 city employees (75% are estimated to be heterosexual) have applied for health insurance for domestic partners<sup>20</sup>.

14. Takoma Park, Maryland

Domestic partners are included in the definition of "immediate family" in the personnel procedures which cover city workers. City workers are provided sick leave to take care of an ill domestic partner and bereavement leave for the death of a domestic partner. Domestic partners are also included as "family members" in the landlord/tenant code.

15. Washington, D.C. (Family and Medical Leave Act of 1990)

This statute provides, inter alia, a total of 16 work-weeks of family leave during any 24 month period to employees in both the private sector and the D.C. government. Included in the definition of "family member" is "a person with whom the employee shares or has shared, within the last year, a mutual residence and with whom the employee maintains a committed relationship."

In addition to the above statute, the Commission on Domestic Partnership for D.C. Government Employees issued a series of recommendations in August 1990 calling for full domestic partnership benefits for D.C. government employees - including health, leave, retirement and disability benefits - by 1995.<sup>21</sup> The recommendations define domestic partners as "two persons who live together in the same permanent residence in a committed relationship characterized by mutual support

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<sup>20</sup> The Wall Street Journal, May 5, 1990.

<sup>21</sup> The Washington Blade, August 31, 1990.





and caring, provided that each person executes a declaration of domestic partnership . . . ."

16. West Hollywood, California

Law applies to:

Anyone (registration with City Clerk)

Economic indicia of couplehood:

The partners "share the common necessities of life" and "are responsible for each other's welfare."

Benefits provided:

1. Visitation rights in health care facilities, jails;
2. Health insurance to domestic partners of city employees.

Number of domestic partnerships registered: 219 (50 are heterosexual couples)<sup>22</sup>

V. EFFECT OF A DECLARATION OF DOMESTIC PARTNERSHIP ON BENEFITS

Persons who are contemplating signing a Declaration of Domestic Partnership, as provided for by Proposition K or similar laws, may also be eligible to receive benefits from public benefits programs. The effect of signing a Declaration of Domestic Partnership on eligibility for, or the amount of benefits received from, public benefit programs presents new questions in a complex area.

Some opinions have already been expressed. For example, Julia I. Lopez, the General Manager of the Department of Social Services of the City and County of San Francisco stated, in an undated memorandum,<sup>23</sup> stated that the "passage of the domestic partners initiative [Proposition K] would not have any effect on eligibility for benefit programs administered by the Department." However, we do not know exactly what questions Ms. Lopez was responding to and her opinion does not cover programs administered exclusively by the federal government.

It is clear that the various public benefit programs will not recognize domestic partners as being the legal equivalent of a married couple and that any language in statutes, ordinances, or regulations which specifically mentions married persons or spouses would NOT apply to domestic partners. However, a

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<sup>22</sup> Lambda Legal Defense and Education Fund.

<sup>23</sup> See Attachment 2.



different issue emerges if a Declaration of Domestic Partnership is considered to be a contract for mutual support. We have examined the issue of public benefits from this perspective, and conclude that eligibility and/or benefit levels under three significant programs - Supplemental Security Income (SSI), Aid to Families with Dependent Children (AFDC), and the Department of Agriculture's Food Stamp Program - could be affected by the signing of a Declaration of Domestic Partnership.

#### A. Supplemental Security Income (SSI)

Supplemental Security Income (SSI)<sup>24</sup> is a federal needs-based welfare program established by Title XVI of the Social Security Act which makes payments to low-income aged, blind and disabled persons. The amount of a person's income is used to determine both eligibility for, and amount of, SSI benefits. Generally, the more income a person has, the lower the SSI benefit will be.

For SSI purposes, income is anything an individual receives in cash or in-kind during a calendar month that can be used to meet his or her needs for food, clothing or shelter. The statute breaks down "income" into two types: "earned" and "unearned." Earned income is remuneration such as wages or earnings from self employment.<sup>25</sup> Unearned income means all other income including "support and maintenance furnished in cash or kind."<sup>26</sup>

When Congress defined unearned income as "support and maintenance furnished in cash or in-kind" it contemplated that a reduced benefit would be paid to those whose essential needs were being satisfied by other means.<sup>27</sup> Additionally, the SSI regulations state that in-kind income:

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<sup>24</sup> Supplemental Security Income should not be confused with Social Security Disability Insurance (SSDI). SSDI is a federal program, administered by the Social Security Administration, which pays income benefits, based on lifetime earning records, to disabled workers and their families. The program is available only to disabled persons with a history of employment. Proposition K would not affect eligibility for this benefit.

<sup>25</sup> 42 U.S.C. 1382a(a)(1).

<sup>26</sup> 42 U.S.C. 1382a(a)(2)(A).

<sup>27</sup> Antonioli v. Harris, 624 F.2d 78 (9th Cir. 1980).





is not cash, but is actually food,  
clothing, or shelter, or something  
you can use to get one of these.<sup>28</sup>  
(emphasis added)

By signing a Declaration of Domestic Partnership, as provided for by Proposition K, two persons are entering into an agreement to be jointly responsible for basic living expenses. Thus, the partners are guaranteeing the support of each other. If one member of a domestic partnership applies for and/or is receiving SSI benefits, the existence of the Declaration of Domestic Partnership could be used by the Social Security Administration as presumptive evidence that an SSI recipient is receiving unearned "in-kind" income from the other partner. This presumption stems from the broad definition of in-kind income in the regulations and could result in a reduction of the recipient's benefits.<sup>29</sup>

There are no cases on this issue, nor has the Social Security Administration issued any policy statements or formal decisions. However, in an analogous situation, where an SSI recipient was living in an apartment owned by children or other relatives and was paying less than fair market value in rent, the Social Security Administration determined that the difference between the fair market value of the rent and the actual rent paid was unearned income. Usher v. Schweiker<sup>30</sup>.

In Usher the SSI recipient argued that because the private rent subsidy could not be turned into cash no accountable income was actually available. In rejecting this argument the court found that the benefit was actually available in the sense that it directly affected and improved the quality of the living environment. Thus, the court found the difference between what was actually paid in rent and what could have been paid in rent to be unearned income.<sup>31</sup> As with this private rent subsidy, it can be argued that the agreement for mutual support found in the domestic partnership agreement directly affects and improves the quality of each partner's life and thus is "income" to the partner who is applying for SSI benefits.

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<sup>28</sup> 20 CFR 416.1102.

<sup>29</sup> There is no dispute that if one partner actually receives support from the other then this would be considered as unearned income.

<sup>30</sup> 666 F.2d 652 (1st Cir., 1981) (reversing Usher v. Califano, 506 F. Supp. 1230 (D. Mass. 1981)).

<sup>31</sup> Usher, 506 F. Supp. at 1232.



Another issue affecting SSI benefits concerns liability for repayment of excess SSI benefits. Overpayment of SSI benefits by the Social Security Administration to an SSI recipient is not an infrequent occurrence. If the recipient is "without fault" for the overpayment, then he/she first applies for a waiver of adjustment or recovery to the Social Security Administration.<sup>32</sup> If the waiver is granted then the recipient is freed from the obligation of repayment.<sup>33</sup> If the waiver is not granted, or if a waiver request is inapplicable then the law provides two methods of recovery of an overpayment - refund and adjustment of future benefits.<sup>34</sup> The Social Security Administration has given a preference to refund as the method of recovery.<sup>35</sup> Only when an overpayment has not been refunded is withholding future benefits appropriate.<sup>36</sup>

If there is no Declaration of Domestic Partnership, a partner is not liable for any SSI overpayment that his or her partner may have received. In contrast, a Declaration of Domestic Partnership creates an obligation for one partner to pay the basic living expense debts owed by the other partner to third parties. It can be argued that SSI benefits are for basic living expenses and thus the domestic partnership agreement makes one partner liable to the federal government for any overpayment of SSI benefits made to the other partner.<sup>37</sup>

#### B. Aid to Families with Dependent Children (AFDC)

Aid to Families With Dependent Children (AFDC)<sup>38</sup> is a federal-state program which makes welfare payments to low-income families with children which include a single, unemployed, or incapacitated parent. States voluntarily participate in the program.<sup>39</sup> However, all participating states, including

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<sup>32</sup> 20 CFR 416.550.

<sup>33</sup> 20 CFR 416.551.

<sup>34</sup> 42 U.S.C. 1383(b)(1).

<sup>35</sup> 20 CFR Section 416.560; See also Program Operations Manual System [POMS] Section 2201.050.

<sup>36</sup> 20 CFR Section 416.570

<sup>37</sup> See POMS Section 2201.002 and 4 U.S.C. 102.1.

<sup>38</sup> 42 U.S.C. 601 et seq.

<sup>39</sup> See, California Welfare and Institutions Code, Section 11200 et seq.





California, must conform to the requirements of the federal program.

Eligibility for AFDC benefits is based upon an assessment of all income and resources available to the applicant family. In the heterosexual context, this has meant that any contribution made by an unrelated adult to the applicant family (even in the form of rent, food or clothing) has acted to reduce the benefits awarded to the applicant.<sup>40</sup> Similar contributions made by a same-sex partner will also be taken into account<sup>41</sup> and the presence of a Declaration of Domestic Partnership could create a presumption of contribution by the partner.

Under both federal and state regulations governing AFDC eligibility, an AFDC applicant or recipient must agree to assign to the state or county "any rights to support from any other person" which have accrued at the time of assignment.<sup>42</sup> While the legislative intent behind these regulations was aimed at recouping child support or alimony payments from an absentee parent and/or spouse, there is nothing to prevent the application of these regulatory provisions to domestic partners who have signed a Declaration of Domestic Partnership.<sup>43</sup> Case law already has allowed these regulations a broad reach.<sup>43</sup>

As with overpayment of SSI benefits, it is possible that overpayments of AFDC benefits may be recouped from the domestic partner of an AFDC recipient. An AFDC recipient's benefits can be reduced because of prior overpayments, so long as the reduction does not exceed 10 percent of the total grant.<sup>44</sup> Recoupment also can be attempted through other "reasonable cost-effective" methods.<sup>45</sup>

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<sup>40</sup> The typical scenario in the heterosexual context is that the applicant is the mother of the family who is living with her male lover.

<sup>41</sup> See, A Legal Guide for Lesbians and Gay Couples, *supra*, pp. 10:6 - 10:8.

<sup>42</sup> 45 CFR 232.11; California Welfare and Institutions Code, Section 11477

<sup>43</sup> See, In Re Waller, 75 B.R. 897 (D. Conn. 1987) (Income tax refund).

<sup>44</sup> California Welfare and Institutions Code, Section 11004(c).

<sup>45</sup> California Welfare and Institutions Code, Section 11004(g).



In situations where an overpayment has been made to an assistance unit which no longer receives aid, "recovery shall be made by appropriate action under state law against the income or resources of the individual responsible for the overpayment or against the family.<sup>46</sup> Under this provision, the domestic partner of an AFDC recipient could be held liable for overpayments based on the Declaration of Domestic Partnership.

### C. Food Stamps

The Food Stamp program is a federally financed, state-run welfare program for low-income persons, which permits low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power.<sup>47</sup> Eligibility guidelines are based on an analysis of household income and resources.

A Food Stamp applicant who lives with, and who customarily purchases and prepares food with others living in the same house, will have his or her program eligibility assessed on the basis of the household aggregate of income and resources.<sup>48</sup> Spouses are presumptively deemed to be a household for purposes of this legislation.<sup>49</sup> If two (or more) individuals live together, are not spouses, and purchase and prepare food separately, each individual's eligibility will be determined independently.<sup>50</sup> The existence of a Declaration of Domestic Partnership should not affect these eligibility guidelines.

While it may be within the discretion of the Department of Agriculture to presumptively view domestic partners as a household, this is unlikely. However, eligibility for Food Stamps may be impacted by the existence of a Declaration of Domestic Partnership if the declaration is viewed as a binding written agreement of support. Under the governing regulations, any money deducted or diverted from a binding written support agreement to a third party for a household expense will be considered income with respect to an applicant's eligibility.<sup>51</sup>

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<sup>46</sup> California Welfare and Institutions Code, Section 11004(h) (emphasis added).

<sup>47</sup> 7 CFR 271.1(a).

<sup>48</sup> 7 CFR 273.1(a)(1)(iii).

<sup>49</sup> 7 CFR 273.1(a)(2)(A).

<sup>50</sup> 7 CFR 273.1(a)(ii).

<sup>51</sup> 7 CFR 273.9(c)(1)(iv)(C).



Consider the case of Domestic Partner A, who lives with Domestic Partner B. Domestic Partner A is unemployed and has applied for Food Stamps. Although they live together, the partners purchase and prepare their food separately. Because of Partner A's unemployment, and as required by their Declaration of Domestic Partnership, Partner B is paying for Partner A's housing costs. Partner B sends a check directly to the landlord for the full amount of their rent. Partner B also directly pays for all of the utilities.

It is possible that these payments made by Partner B could be viewed under the Food Stamp regulations as monies deducted or diverted from a written support agreement; thereby reducing or eliminating Partner A's Food Stamp allotment.

As seen with other benefit programs, the domestic partners of food stamp recipients may be liable for the repayment of the value of overissued food stamps. Under the governing provisions, the government is entitled to recoup the value of any over-issuance of food stamps and authorizes state agencies to pursue collection. While reduction of coupon allotment is the first method of collection used, if that fails or is impossible, state agencies may use other means of collection.<sup>52</sup> These means of collection include the filing of court actions<sup>53</sup> and the garnishment of unemployment compensation.<sup>54</sup> Under the auspices of state court litigation, it would be within the jurisdiction of the state to attempt to reach all resources available to the food stamp recipient. If the recipient and his/her domestic partner had signed a Declaration of Domestic Partnership which included a commitment for mutual support, the domestic partner could be held liable for the value of the over-issuance.

## VI. IMMIGRATION/NATURALIZATION ISSUES<sup>55</sup>

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<sup>52</sup> 7 U.S.C. 2022(b)(1)(A) and (b)(2)(B).

<sup>53</sup> Alexander v. Robinson, 756 F.2d 1153 (5th Cir. 1985).

<sup>54</sup> 7 U.S.C. 2022(c).

<sup>55</sup> Introduction adapted from Sexual Orientation and the Law, *supra*. It is important to note that on October 25, 1990, House and Senate negotiators approved a landmark revision of the nation's immigration laws and policies, including removing restrictions against gay men and lesbians. (The New York Times, October 26, 1990). The bill is now pending final approval by Congress and President Bush's signature. Thus, the advice provided in this section may be incorrect if the legislation becomes law.





The legal status of non-citizens is in jeopardy at all stages of the immigration and naturalization process. The Immigration and Naturalization Service (INS) of the Department of Justice, in conjunction with the Public Health Service (PHS) of the Department of Health and Human Services (HHS), may deny non-citizens a visa or entry into the country, may re-evaluate and deny non-citizens re-entry should they leave the country and then wish to return, may deport non-citizens, or may deny non-citizens permanent citizenship.

#### A. Exclusion at Entry

Any non-citizen of the United States, including a person who is a lawful permanent resident, is subject to exclusion each and every time he or she seeks to enter or re-enter the United States. Exclusion at entry differs from deportation in that the non-citizen is not deemed to have entered the United States and thus has fewer procedural protection than a person already in the United States who becomes the subject of deportation proceedings.

Gay male and lesbian non-citizens have been particularly affected by Section 212(a) of the Immigration and Nationality Act (INA).<sup>56</sup> Section 212(a)(4) of the Act denies entry into the United States to persons "afflicted with psychopathic personality, or sexual deviation," and section 212(a)(9) bars admission to the country of anyone "who has been convicted of a crime involving moral turpitude."

The determination of whether a non-resident is afflicted with a "psychopathic personality"<sup>57</sup> is performed by the PHS. In 1979, however, HHS decided that the Public Health Service could no longer certify that a non-citizen suffered from a medical condition requiring exclusion solely because he or she was a gay male or lesbian. This change significantly reduced the INS' ability to exclude gay male and lesbian non-citizens from the United States.

In California, and other states and territories which are part of the federal Ninth Circuit Court of Appeals (Washington, Oregon, Idaho, Nevada, Arizona, Alaska, Hawaii, and Guam), the INS cannot exclude a non-citizen from entry unless he or she has received a medical certification from the PHS. Because PHS will no longer provide such certification, gay men and lesbians cannot be barred from entry into the United States within the jurisdiction of the

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<sup>56</sup> 8 U.S.C. 1101 et seq.

<sup>57</sup> The Supreme Court in Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967) let stand the Public Health Service's determination that homosexuality was a psychopathic disorder.



Ninth Circuit.<sup>58</sup> Outside of the Ninth Circuit, however, exclusion on the basis of being gay or lesbian is still possible, especially when a voluntary admission of homosexuality is made.<sup>59</sup> A Declaration of Domestic Partnership could be construed as such a voluntary admission by the INS.<sup>60</sup> Therefore, it may be dangerous for lesbian and gay male non-citizens to sign and/or file a Declaration of Domestic Partnership, as the existence of the declaration, if brought to the attention of the INS, may result in exclusion from entry into the United States.

It is unclear from Proposition K whether both prospective partners must be present in the United States in order to file a Declaration of Domestic Partnership, or if the declaration could be signed in another country and physically filed in San Francisco by only one partner. If this type of filing is possible and the declaration came to the attention of INS officials, the declaration could be considered as an admission of homosexuality and thereby provide a basis for the exclusion of the non-citizen partner should he/she attempt to enter the United States at any border outside of the Ninth Circuit's jurisdiction.

While INS officials no longer ask direct questions at United States borders regarding sexual orientation, the existence of a Declaration of Domestic Partnership could be revealed to an INS official in the search of the non-citizen's possessions, a search of public records in City Hall if the declaration of domestic partnership has been filed with the City Clerk, or a change in INS questioning policies.

If a Declaration of Domestic Partnership is executed and filed where one partner is a non-citizen, and that partner subsequently leaves and then attempts to re-enter the United States (outside of the Ninth Circuit), that partner could be excluded from re-entering the country as outlined above.

#### B. Deportation

Non-citizens may be deported from the United States if they were excludable upon entering the country but nevertheless were admitted. If a lesbian or gay male non-citizen entered the United States (in a state outside of the Ninth Circuit) and subsequently registered as a domestic partner, the Declaration of Domestic

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<sup>58</sup> In Re Hill, 714 F.2d 1470 (9th Cir. 1983).

<sup>59</sup> Matter of Longstaff, 716 F.2d 1439 (5th Cir. 1983) cert. denied 467 U.S. 1219 (1984).

<sup>60</sup> The INS will look to "an unequivocal, unambiguous declaration" the non-citizen is a gay male or lesbian (INS Policy Memoranda C.O. 245.5-P and C.O. 245-P).



Partnership could provide the INS with sufficient evidence of excludability at entry, i.e., that the non-citizen was lesbian or gay when she/he entered the United States and thus should not have been admitted. On this basis, the non-citizen could be deported.

A non-citizen may also be deported if he or she admits to committing an act which constitutes the elements of a crime of "moral turpitude," including sex crimes and lewd conduct. The existence of a Declaration of Domestic Partnership could be considered partial evidence of such an admission or lead to the initiation of an investigation of such crimes, especially in states where gay and lesbian sexual behavior have not been decriminalized.

### C. Naturalization

A Declaration of Domestic Partnership may also effect lesbian and gay male non-citizens in their attempts to become naturalized, i.e., to gain United States citizenship. Among the criteria for naturalization, a petitioner must prove that she/he lawfully was admitted into the United States. If the petitioner was excludable at entry, discovery of such a fact could cause the naturalization petition to be denied and the petitioner deported.

While there is no statute which expressly excludes lesbians and gay men from becoming naturalized citizens, all applicants for citizenship must prove that they possess "good moral character." This obligation includes the duty to be completely honest in all INS proceedings. While private sexual conduct is generally excluded from an INS determination of good moral character, the presence of a Declaration of Domestic Partnership may heighten the scrutiny applied to such determinations, especially in light of the fact that admission to the elements of a crime of moral turpitude is a bar to a finding of good moral character.

Also, a finding of good moral character may be jeopardized if a Declaration of Domestic Partnership provides evidence to the INS that the petitioner was not forthright upon entering the United States. This would be seen where the petitioner failed to disclose his or her sexual orientation upon entry where such disclosure would have been grounds for exclusion.<sup>61</sup>

## VII. FINANCIAL ISSUES

A Declaration of Domestic Partnership, such as provided by Proposition K, creates potentially broad financial obligations for each domestic partner. When two partners sign a Declaration of

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<sup>61</sup> See, Kovacs v. United States, 476 F. 2d 843 (2d Cir. 1973).





Domestic Partnership they are agreeing to be jointly responsible for each other's "basic living expenses" and explicitly give to third parties the right to enforce the agreement by collecting from one partner, the debts incurred by the other partner for such expenses. Thus, prospective domestic partners must fully understand the scope of the domestic partnership agreement. Additionally, persons with AIDS or other life threatening illnesses need practical and sound advice on how to avoid potential financial problems and catastrophes.

A. What is a "basic living expense?"

Proposition K defines "basic living expenses" as "the cost of basic food and shelter" (Section 2(c)). However, no definition is given for the terms "basic," "food," or "shelter." Nor have the phrases "basic living expenses" and "basic food and shelter" been addressed in case law. It is not at all clear how the determination of "basic living expenses" is to be made.

At a minimum, "basic" may mean the amount of money necessary to maintain a person at federal poverty guidelines. A more realistic standard may be that "basic living expenses" means the amount of support necessary to maintain a person with the food and shelter to which he or she is accustomed, i.e., the "station in life" test. Such a test is already used in the area of spendthrift trusts.<sup>62</sup>

A spendthrift trust is a form of protective trust in which the property given in trust for another cannot be subject to the claims of creditors. Such trusts are often created for the purpose of providing a fund for the maintenance and support of a person and at the same time securing the money against the person's own improvidence or incapacity.<sup>63</sup> A station-in-life test is used to determine the amount necessary for support.<sup>64</sup> If the "basic living expenses" language of Proposition K is analogized to the "support" language of spendthrift trusts, a domestic partner's liability for the expenses of basic food and shelter could be extensive, depending on the "station-in-life" of his/her partner. Even applying a reasonableness test to the definition of basic food and shelter could lead to extensive liabilities, especially if one of the partners goes on a "spending spree" and purchases items on credit without the knowledge of the other partner. Unfortunately such spending sprees frequently occur when one partner is under the stress of an AIDS or HIV-related diagnosis or has an AIDS-related condition such as dementia.

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<sup>62</sup> California Probate Code, Section 15300 et seq.

<sup>63</sup> See, 60 Cal Jur 3d, Trusts, Section 89 et seq.

<sup>64</sup> See, comment to California Probate Code, Section 15307.



## B. Third Party Rights - Generally

Proposition K provides that "anyone" to whom basic living expenses are owed has the right to enforce the agreement made by the partners. Proposition K does not define "anyone," but two statutes which similarly provide remedies to creditors have been given broad reach. These statutes define "person" to mean "a natural person, a corporation, a partnership, or other unincorporated association and a public entity."<sup>65</sup> Thus, it is likely that natural persons, corporations, unincorporated associations and public entities would be included in the term "anyone" and would be able to enforce the partners' agreement to be jointly responsible for basic living expenses.

## C. Third Party Rights - Expenses for Shelter

Under Proposition K, third party creditors can collect from one partner the debts incurred by the other partner for "shelter." The term "shelter" is not defined by Proposition K. We can, however, look to other sources for its meaning. For example, in the Social Security regulations "shelter" is defined as including room, rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewerage and garbage collection services.<sup>66</sup> Thus, responsibility for a partner's shelter expenses can have a broad reach.

This broad responsibility could even extend into costs incurred in healthcare settings. For example, if Partner A enters a nursing home or a hospital, part of the charge by the nursing home or hospital is for shelter, i.e., room and board, as opposed to charges for medical care. Partner B could be held liable by the nursing home or hospital for that portion of the expenses attributable to room and board for Partner A. Partner B would not be liable for medical expenses per se as these are not basic living expenses as defined by Proposition K.<sup>67</sup> However, Partner

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<sup>65</sup> California Civil Procedure, Section 481.170 (allowing a "person" to attach property under certain circumstances) and California Civil Procedure, Section 680.280 (defining a judgment creditor as a "person" in whose favor a judgment has been entered).

<sup>66</sup> 20 CFR 416.1130(b).

<sup>67</sup> Domestic partners do assume liability for expenses "which are paid at least in part by a program or benefit for which the partner qualified because of the domestic partnership." (Section 2(c)). If one partner's employer provides health insurance coverage for domestic partners and one partner incurs

(continued...)



B's liability to the hospital or nursing home could be broad, particularly in view of current daily charges for room and board of \$500 or more.

While Proposition K requires that the prospective domestic partners live together, this does not prevent them from having additional and separate residences, nor do both partners' names have to appear on a lease. It is thus possible that if Partner A solely owns or rents either the primary residence or a second property, then Partner B could become liable for the expenses related to that property. Partner B's liability on a second residence would depend on how broadly the term "shelter" is interpreted.

Another area of concern which arises from the partners' agreement to be jointly responsible for shelter expenses arises when dealing with mortgages. A mortgage (deed of trust) is a security held in a property for a loan which is usually made to purchase the property. When the person to whom the loan is made cannot make the payments on the loan then the holder of the mortgage can foreclose on the mortgage and sell the property. If the sale of the property yields enough to satisfy the debt then there is no problem and there are no other liabilities.

If the sale of the property does not yield enough to satisfy the loan, then in some states the holder of the mortgage can obtain a personal judgment against the person who borrowed the money. This is called a deficiency judgment as it makes up the difference between the sales price and the loan balance. In California, such judgments are prohibited by law.<sup>68</sup> However, in other states these judgments are permitted.

If a bank or other lender was permitted by state law to obtain a deficiency judgment and the borrower against whom the judgment was obtained could not pay it, then the lender may be able to enforce the judgment against the borrower's domestic partner.<sup>69</sup> The lender would argue that the Declaration of Domestic Partnership created third party rights for basic food and shelter and that the loan and subsequent judgment were for basic shelter.

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<sup>67</sup>(...continued)  
uncovered medical expenses because of a cap on the amount the insurance will reimburse, then both domestic partners would be liable for the unreimbursed charges.

<sup>68</sup> California Civil Procedure, Section 580(b).

<sup>69</sup> It is important to remember that if the partners held the property in joint title then the bank could proceed against both the partners under any circumstances.





The lender would then try to obtain payment from the domestic partner. Thus, domestic partners who register under the proposed ordinance and who own property in states where there are not anti-deficiency laws should be forewarned of the possible effect of a mortgage default.

### C. Third Party Rights - Estate Planning

Another area which is impacted by the rights of third parties created by a domestic partnership agreement concerns traditional estate planning techniques. For example, Partner A may have a life-threatening illness and may reasonably anticipate major expenses. In order to protect Partner A's limited assets, Partner A will be counseled to place his or her money in a joint bank account or to specifically name Partner B as the beneficiary of Partner A's life insurance proceeds. By so doing Partner A can insulate part of his/her assets from creditors' actions upon Partner A's death because such property will pass directly to Partner B, outside of the estate of Partner A.<sup>70</sup>

If, however, Partner A and Partner B have signed a Declaration of Domestic Partnership, then upon Partner A's death, his or her creditors for basic living expenses can request payment from Partner B. Even though the money which Partner B received from Partner A's estate had been previously protected from direct attack by Partner A's creditors, because of the domestic partnership agreement, Partner A's creditors could obtain payment from Partner B. The domestic partnership agreement would obligate Partner B to make such payment.

## VII. OTHER CONSIDERATIONS

### A. Confidentiality and Privacy

There is no confidentiality or privacy protection provided by Proposition K. If the domestic partners choose to file their declaration with the County Clerk in San Francisco's City Hall everyone will have access to these public records: insurance companies investigating an application or claim, employers conducting a security clearance check, the military and other government agencies, or persons bent on harassment.

### B. Partnership Law

Any domestic partnership must be examined in light of a state's laws concerning partnerships. In San Francisco a domestic partnership formed under Proposition K will NOT be controlled by California laws governing partnerships. California Corporation Code Section 15006(1) states:

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<sup>70</sup> California Probate Code, Section 13050 et seq.



A partnership is an association of two or more persons to carry on as co-owners a business for profit.

Clearly the formation of a domestic partnership is not the creation of a "business for profit." This is true even where the partners are joint owners of property and that property generates a profit.<sup>71</sup> However, the laws of other states might yield different results.

#### VIII. CONCLUSION

The creation of domestic partnerships is one way to begin to correct the discrimination experienced by lesbian and gay male families. However, because state marriage laws largely preempt legislative action in this area, domestic partners ordinances which provide only for registration, such as San Francisco's Proposition K, cannot achieve the goal of providing full equality with married persons. Couples who register under the provisions of such laws should understand this.

Moreover, under Proposition K and other domestic partnership laws, domestic partners will be assuming financial obligations which are similar to those which married people assume. Thus, it is critical for couples who are considering registering as domestic partners to be educated as to the possible ramifications such registration may entail. When fully informed, couples who desire to register will be able to weigh the benefits and burdens of entering into domestic partnership agreements, and make an informed choice as to how they wish to proclaim their relationships to society.

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<sup>71</sup> California Corporation Code, Section 15007(2).



The People amend The San Francisco Administrative Code by adding a new Chapter, to read:

RECOGNITION OF  
DOMESTIC PARTNERSHIPS

Sec. 1. PURPOSE

The purpose of this ordinance is to create a way to recognize intimate committed relationships, including those of lesbians and gay men who otherwise are denied the right to identify the partners with whom they share their lives. All costs of registration must be covered by fees to be established by ordinance.

Sec. 2. DEFINITIONS

(a) Domestic Partnership. Domestic Partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, who live together, and who have agreed to be jointly responsible for basic living expenses incurred during the Domestic Partnership. They must sign a Declaration of Domestic Partnership, and establish the partnership under section 3 of this chapter.

(b) "Live Together." "Live together" means that two people share the same living quarters. It is not necessary that the legal right to possess the quarters be in both of their names. Two people may live together even if one or both have additional living quarters. Domestic Partners do not cease to live together if one leaves the shared quarters but intends to return.

(c) "Basic Living Expenses." "Basic living expenses" means the cost of basic food and shelter. It also includes the expenses which are paid at least in part by a program or benefit for which the partner qualified because of the domestic partnership. The individuals need not contribute equally or jointly to the cost of these expenses as long as they agree that both are responsible for the costs.

(d) "Declaration of Domestic Partnership." A "Declaration of Domestic Partnership" is a form provided by the county clerk. By signing it, two people agree to be jointly responsible for basic living expenses which they incur during the domestic partnership and that this agreement can be enforced by anyone to whom those expenses are owed. They also state under penalty of perjury that they met the definition of domestic partnership when they signed the statement, that neither is married, that they are not related to each other in a way which would bar marriage in California, and that neither had a different domestic partner less than six months before they signed. This last condition does not apply if the previous domestic partner died. The form will also require each partner to provide a mailing address.

Sec. 3. ESTABLISHING A DOMESTIC PARTNERSHIP

(a) Methods. Two persons may establish a Domestic Partnership by either:

1. presenting a signed Declaration of Domestic Partnership to the County Clerk, who will file it and give the partners a certificate showing that the Declaration was filed; or
2. having a Declaration of Domestic Partnership notarized and giving a copy to the person who witnessed the signing (who may or may not be the notary).

(b) Time Limitation. A person can not become a member of a Domestic Partnership until at least six months after any other Domestic Partnership of which he or she was a member ended. This does not apply if the earlier domestic partnership ended because one of the members died.

(c) Residence Limitation. The county clerk will only file Declarations of Domestic Partnership if:

1. the partners have a residence in San Francisco; or
2. at least one of the partners works in San Francisco.





#### Sec. 4. ENDING DOMESTIC PARTNERSHIPS

(a) When the Partnership Ends. A Domestic Partnership ends when:

1. one partner sends the other a written notice that he or she has ended the partnership; or
2. one of the partners dies.
3. one of the partners marries or the partners no longer live together.

(b) Notice the Partnership has ended.

(1) To Domestic Partners. When a Domestic Partnership ends, at least one of the partners must sign a notice saying that the partnership has ended. The notice must be dated and signed under penalty of perjury. If the Declaration of Domestic Partnership was filed with the county clerk, the notice must be filed with the clerk; otherwise, the notice must be notarized. The partner who signs the notice must send a copy to the other partner.

(2) To Third Parties. When a Domestic Partnership ends, a Domestic Partner who has given a copy of a Declaration of Domestic Partnership to any third party, (or, if that partner has died, the surviving member of the domestic partnership) must give that third party a notice signed under penalty of perjury stating the partnership has ended. The notice must be sent within 60 days of the end of the Domestic Partnership.

(3) Failure to Give Notice. Failure to give either of the notices required by this subsection will neither prevent nor delay termination of the Domestic Partnership. Anyone who suffers any loss as a result of failure to send either of these notices may sue the partner who was obliged to send it for actual losses.

#### Sec. 5. COUNTY CLERK'S RECORDS

(a) Amendments to Declarations. A Partner may amend a Declaration of Domestic Partnership filed with the County Clerk at any time to show a change in his or her mailing address.

(b) New Declarations of Domestic Partnership. No person who has filed a declaration of Domestic Partnership with the county clerk may file another declaration of Domestic Partnership until six months after a notice the partnership has ended has been filed. However, if the Domestic Partnership ended because one of the partners died, a new Declaration may be filed anytime after the notice the partnership ended is filed.

(c) Maintenance of County Clerk's Records. The County Clerk will keep a record of all Declarations of Domestic Partnership, Amendments to Declarations of Domestic Partnership and all notices that a partnership has ended. The records will be maintained so that Amendments and notices a partnership has ended are filed with the Declarations of Domestic Partnership to which they apply.

(d) Filing Fees. The Board of Supervisors will set the filing fee for Declarations of Domestic Partnership and Amendments. No fee will be charged for notices that a partnership has ended. The fees charged must cover the city's cost of administering this ordinance.

#### Sec. 6. LEGAL EFFECT OF DECLARATION OF DOMESTIC PARTNERSHIP

(a) Obligations. The obligations of domestic partners to each other are those described in the definition.

(b) Duration of Rights and Duties. If a domestic partnership ends, the partners incur no further obligations to each other.

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IN THE DEPARTMENT OF THE HISTORY OF ARTS AND ARCHITECTURE

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Julia I. Lopez  
General Manager

Claude E. Finn  
Deputy General Manager

Assistant General Managers  
Ann O' Rielly  
Rose Lou Randolph  
John R. Vera

## M E M O

TO: Social Services Commission  
FROM: Julia I. Lopez *[Signature]*  
DATE: September 10, 1990  
RE: The Domestic Partners Initiative and Eligibility for  
DSS-Administered Programs

We have concluded that passage of the domestic partners initiative would not have any affect on eligibility for benefit programs administered by the Department. Eligibility for DSS programs is generally determined by marital status and living situation. Registration as a domestic partner will not affect either of these considerations. In addition, passage of the initiative would have no impact on child custody regulations at the Department.

Federal and state mandated programs, including AFDC, Food Stamps, GAIN and MediCal, will not recognize domestic partner registration as "legal marriage." As a result, registered partners who are living together will continue to be considered single individuals for purposes of eligibility determination and computation of benefit levels. The General Assistance program, which is fully administered by the city and county, also defines cohabitating adults as single individuals unless they are "husband and wife" and a "legally married couple." Registration as "domestic partners" will not change a couples' GA status.

ATTACHMENT 2



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